U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF AKS-, INC.

DATE: OCT. 1, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology services, seeks to employ the Beneficiary as a computer programmer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

On appeal, the Petitioner submits additional evidence. It argues that, contrary to U.S. Citizenship and Immigration Services (USCIS) policy, the Director disregarded the company's wage payments to the Beneficiary and evidence of its ability to pay the difference between the proffered wage and his wages.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following opinion.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and the requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with less than 100 employees, like this Petitioner, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the accompanying labor certification states the proffered wage of the offered position of computer programmer as $115,586 a year. The petition's priority date is August 16, 2017, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status since May 2014. The company submitted copies of IRS Forms W-2, Wage and Tax Statements, for 2017 and 2018, and payroll records for 2018. The documents indicate that the Petitioner paid the Beneficiary $102,940 in 2017 and $96,427.29 in 2018. Neither amount equals or exceeds the annual proffered wage of $115,586. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage.

As previously indicated, however, USCIS credits wages a petitioner paid a beneficiary in relevant years, even if the payments did not equal or exceed the proffered wage. In a given year, a petitioner need only demonstrate its ability to pay the difference between an annual proffered wage and wages it paid a beneficiary. Here, the Director rejected evidence of the Petitioner's payments to the Beneficiary. The Director appears to have found that, under 8 C.F.R. § 204.2(g)(2), the Forms W-2 and payroll records did not constitute required evidence of the company's ability to pay. But, unless a beneficiary is a petitioner's corporate officer or sole employee, required evidence will not typically specify the wages of an individual beneficiary. Rather, as long as a petitioner complies with 8 C.F.R. § 204.5(g)(2) by submitting copies of an annual report, federal tax return, or audited financial statement for a relevant year, USCIS must consider additional evidence of payments to a beneficiary.

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rahman v. Chertoff*, 641 F.Supp.2d 349, 351-52 (D. Del. 2009).

The Petitioner here has submitted required evidence of its ability to pay in the form of copies of its federal income tax returns for 2017 and 2018. For those same years, the copies of the Forms W-2 and payroll records constitute reliable, consistent documentation of the company's payments to the Beneficiary. Thus, contrary to the Director's decision, we credit the Petitioner's evidence of wages it paid the Beneficiary. The company need only demonstrate its ability to pay the differences between the annual proffered wage and the wages paid, or $12,646 in 2017 and $19,158.71 in 2018.

The Petitioner's 2017 tax return reflects net income of $106,363 and net current assets of $104,742. Both of these amounts exceed the $12,646 difference between the proffered wage and wages paid in 2017. The Petitioner's 2018 tax return shows net income of $83,682 and net current assets of $333,363. These amounts exceed the $19,158.71 difference between the proffered wage and wages paid in 2018. Thus, the record establishes the Petitioner's ability to pay the Beneficiary's individual proffered wage in 2017 and 2018.

The record appears to demonstrate the Petitioner's ability to pay the proffered wage. But, although unaddressed by the Director, USCIS records indicate the company's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of August 16, 2017, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records indicate the Petitioner's filing of at least 16 immigrant petitions for other beneficiaries that were pending or approved as of August 16, 2017, or filed thereafter.[3] The record lacks the proffered wages or priority dates of these other petitions. Without that information, the record does not establish the Petitioner's ability to pay the proffered wage.

The Director did not notify the Petitioner of the need for additional information regarding its other petitions. We will therefore remand the matter. On remand, the Director should ask the Petitioner to provide the proffered wages and priority dates of the other 16 petitions. The Petitioner may also submit additional evidence of its ability to pay the combined proffered wages, including proof of any wages it paid relevant beneficiaries in 2017 or 2018, and materials supporting the factors stated in *Sonegawa*.

[2] The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that it withdrew or, unless pending on appeal, that USCIS denied, revoked, or rejected. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries obtained lawful permanent residence.

[3] USCIS records identify the 16 other petitions by the following receipt numbers:

III. REQUIRED EXPERIENCE

Also unaddressed by the Director, the record does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of computer programmer as a bachelor's degree in computer science or electronics/communication engineering, and five years of experience in the job offered or as a "technical leader." On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained about seven years of full-time, qualifying experience in India. He stated that, before joining the Petitioner in the offered position in May 2014, he worked as a technical leader for a software development and consulting firm from April 2007 to April 2014.[4]

To support a beneficiary's claimed, qualifying experience, a petitioner must submit a letter from a former employer. 8 C.F.R. § 204.5(g)(1). The Petitioner here submitted a letter from the Indian software company indicating that it employed the Beneficiary from April 2007 to April 2014, and describing his duties. The letter, however, states that "[h]is designation at the time of leaving is Technical Leader." Thus, the letter suggests that the Beneficiary may have held other positions during his tenure with the employer and does not specify for how long he worked as technical leader. The record therefore does not establish that the Beneficiary met the offered position's minimum requirements of five years of experience in the job offered or as a technical leader.

The Director did not notify the Petitioner of this evidentiary deficiency. On remand, the Director therefore should ask the company to submit additional evidence of the Beneficiary's claimed, qualifying experience. The Petitioner must establish that the Indian software company employed the Beneficiary for at least five years as a technical leader.

The Director should provide the Petitioner with a reasonable period to respond to the requests regarding both the company's ability to pay the combined proffered wages and the Beneficiary's experience. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

[4] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was gained in a position substantially different than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the job. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

IV. CONCLUSION

Contrary to the Director's decision, the record establishes the Petitioner's ability to pay the petition's individual proffered wage. The Petitioner, however, has not demonstrated its ability to pay the combined proffered wages of this and petitions it filed for other beneficiaries that were pending or approved as of this petition's priority date, or filed shortly thereafter. The record also does not establish the Beneficiary's possession of the minimum experience required for the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of AKS-, Inc.*, ID# 6523480 (AAO Oct. 1, 2019)